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[FR Doc. 95-2815 Filed 2-3-95; 8:45 am]

BILLING CODE 4910-13-M

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 230

[Release No. 33-7132; International Series
Release No. 780; File No. S7-36-94]

RIN 3235-AG26

Adoption of Amendments To Clarify Safe Harbors for Broker-Dealer Research Reports

AGENCY: Securities and Exchange
Commission.

ACTION: Final rules.

SUMMARY: The Commission is announcing the adoption of amendments relating to the safe harbor provisions of Rules 138 and 139 under the Securities Act of 1933. The amendments clarify the availability of the safe harbor provisions of Rule 138 relating to broker-dealer research reports on individual domestic and foreign companies and the availability of the safe harbor provisions of Rule 139 for broker-dealer industry research reports which include sizable, first-time foreign registrants.

EFFECTIVE DATE: February 6, 1995.

FOR FURTHER INFORMATION CONTACT: Annemarie Tierney, (202) 942-2990, Office of International Corporate Finance, Division of Corporation Finance, U.S. Securities and Exchange Commission, 450 Fifth Street NW., Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: As described in detail below, the Commission is adopting amendments to Rule 138¹ and Rule 139² under the Securities Act of 1933 (the "Securities Act")³. The amendments adopted today were proposed by the Commission on December 13, 1994.⁴

¹ 17 CFR 230.138.

² 17 CFR 230.139.

³ 15 U.S.C. 77a *et seq.*

⁴ See Release No. 33-7120 (Dec. 13, 1994), 59 FR 31038. One comment letter, which expressed support for the proposal, was received. That letter is available for public inspection and copying in File Number S7-36-94 at the Commission's Public Reference Room in Washington, D.C.

I. Availability of Research Report Safe Harbors

Rule 138 under the Securities Act permits publication of information, opinions and recommendations concerning qualifying issuers by broker-dealers that are participants in a distribution, so long as the reports contain information, opinions or recommendations regarding a specified class of the issuer's securities which is not the subject of the offering in which the broker-dealer is a participant. The amendments adopted today clarify that Rule 138 is available for offerings registered on Form S-3. The amendments also clarify that Form F-3 eligible issuers qualify for the rule, as do sizable first-time foreign issuers that meet the alternative offshore trading history test adopted for Rule 139.

In addition, in light of the fact that shelf registration statements often register both debt and equity securities (on an either allocated or unallocated basis), the Commission is amending Rule 138 to add an instruction codifying the staff interpretation that the rule should be applied on an offering-by-offering basis for issuers which are eligible to use Forms S-3 or F-3 and are using the Commission's shelf registration procedures. Thus, the filing of a shelf registration statement covering different classes of securities does not impede the availability of the rule.

Rule 139 under the Securities Act provides safe harbor protection from the registration requirements of that Act for the distribution by broker-dealers of information, opinions or recommendations concerning issuers in the process of registering securities under the Securities Act. The amendments adopted today make clear that the expanded eligibility requirements adopted last year⁵ for sizable foreign issuers that satisfy the alternative offshore trading history test in Rule 139 are also available for those issuers' initial public offerings in the United States.

II. Cost-Benefit Analysis

No information was provided in response to the Commission's request regarding the costs and benefits of the

⁵ Release No. 33-7053 (Apr. 19, 1994), 59 FR 21644.

amendments being adopted today. The Commission believes that the adoption of these amendments will benefit both issuers and broker-dealers without imposing any additional costs.

III. Statutory Bases

The Commission's rules are being amended pursuant to sections 6, 7, 8, 10 and 19(a) of the Securities Act of 1933, as amended.

IV. Effective Date

The final amendments to the Commission's rules shall be effective immediately upon publication in the **Federal Register**, in accordance with the Administrative Procedure Act, which allows effectiveness in less than 30 days after publication for, *inter alia*, "a substantive rule which grants or recognizes an exemption or relieves a restriction." 5 U.S.C. § 553(d)(1).

List of Subjects in 17 CFR Part 230

Reporting and recordkeeping requirements, Securities.

Text of Proposed Amendments

In accordance with the foregoing, Title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 230—GENERAL RULES AND REGULATIONS, SECURITIES ACT OF 1933

1. The general authority citation for Part 230 continues to read in part as follows:

Authority: 15 U.S.C. 77b, 77f, 77g, 77h, 77j, 77s, 77sss, 78c, 78l, 78m, 78n, 78o, 78w, 78ll(d), 79t, 80a-8, 80a-29, 80a-30, and 80a-37, unless otherwise noted.

* * * * *

2. By revising § 230.138 to read as follows:

§ 230.138 Definition of "offer for sale" and "offer to sell" in sections 2(10) and 5(c) in relation to certain publications.

(a) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to a nonconvertible debt security or to a nonconvertible, nonparticipating preferred stock, publication or distribution in the regular course of its

business by a broker or dealer of information, opinions or recommendations relating solely to common stock or to debt or preferred stock convertible into common stock of such registrant shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*) even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(b) Where a registrant which meets the requirements of paragraph (c)(1), (c)(2) or (c)(3) of this section proposes to file, has filed or has an effective registration statement under the Act relating solely to common stock or to debt or preferred stock convertible into common stock, the publication or distribution in the regular course of its business by a broker or dealer of information, opinions or recommendations relating solely to a nonconvertible debt security, or to a nonconvertible nonparticipating preferred stock shall not be deemed to constitute an offer for sale or offer to sell the security to which such registration statement relates for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of the security to which such registration statement relates.

(c)(1) The registrant meets all of the conditions for the use of Form S-2 [§ 239.12 of this chapter] or Form F-2 [§ 239.32 of this chapter];

(2) The registrant meets the registrant requirements of Form S-3 [§ 239.13 of this chapter] or Form F-3 [§ 239.33 of this chapter]; or

(3) The registrant is a foreign private issuer which meets all the registrant requirements of Form F-3 [§ 239.33 of this chapter], other than the reporting history provisions of paragraph A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I. of such form and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in § 230.902(a).

Instruction to Rule 138

When a registration statement relates to securities which are being registered for an offering to be made on a continuous or delayed basis pursuant to Rule 415(a)(1)(x) under the Act (§ 230.415(a)(1)(x)) and the securities which are being registered include classes of securities which are specified in

both paragraphs (a) and (b) of this section on either an allocated or unallocated basis, a broker or dealer may nonetheless rely on:

1. Paragraph (a) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (a) of this section, and

2. Paragraph (b) of this section when the offering in which such broker or dealer is or will be a participant relates solely to classes of securities specified in paragraph (b) of this section.

3. By revising the introductory text to § 230.139 and paragraph (a)(2) to read as follows:

§ 230.139 Definition of "offer for sale" and "offer to sell" in sections 2(10) and 5(c) in relation to certain publications.

Where a registrant which is required to file reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) or which is a foreign private issuer meeting the conditions of paragraph (a)(2) of this section proposes to file, has filed or has an effective registration statement under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) relating to its securities, the publication or distribution by a broker or dealer of information, an opinion or a recommendation with respect to the registrant or any class of its securities shall not be deemed to constitute an offer for sale or offer to sell the securities registered or proposed to be registered for purposes of sections 2(10) and 5(c) of the Act (15 U.S.C. 77a *et seq.*), even though such broker or dealer is or will be a participant in the distribution of such securities, if the conditions of paragraph (a) or (b) of this section have been met:

(a) * * *

(2) The registrant is a foreign private issuer that meets all the registrant requirements of Form F-3 (§ 239.33 of this chapter), other than the reporting history provisions of paragraphs A.1. and A.2.(a) of General Instruction I of such form, and meets the minimum float or investment grade securities provisions of either paragraph B.1. or B.2. of General Instruction I of such form, and the registrant's securities have been traded for a period of at least 12 months on a designated offshore securities market, as defined in § 230.902(a), and such information, opinion or recommendation is contained in a publication which is distributed with reasonable regularity in the normal course of business.

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By the Commission.

Dated: February 1, 1995.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 95-2892 Filed 2-2-95; 8:45 am]

BILLING CODE 8010-01-P

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 4

[T. D. 95-14]

Addition of Brazil to the List of Nations Entitled to Special Tonnage Tax Exemption

AGENCY: U. S. Customs Service,
Department of the Treasury.

ACTION: Final rule.

SUMMARY: Pursuant to information provided by the Department of State, the United States Customs Service has found that Brazil no longer imposes discriminating duties of tonnage or imposts upon vessels belonging to citizens of the United States. Accordingly, vessels of Brazil are exempt from special tonnage taxes and light money in ports of the United States. This document amends the Customs Regulations by adding Brazil to the list of nations whose vessels are exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in Brazil became effective on September 15, 1994. This amendment is effective February 6, 1995.

FOR FURTHER INFORMATION CONTACT:
Barbara E. Whiting, Carrier Rulings
Branch (202-482-6940).

SUPPLEMENTARY INFORMATION:

Background

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, called "light money," on all foreign vessels which enter United States ports (46 U.S.C. App. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. App. 141).

Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been found to be exempt from the payment of any higher tonnage